United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7037

To be argued by:
ARTHUR D. SPATT

United States Court of Appeals

For the Second Circuit.

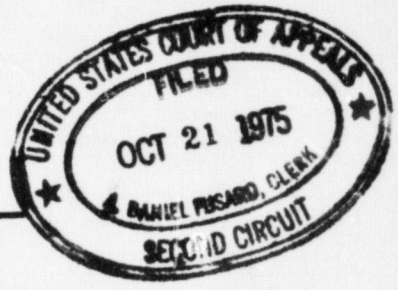
B

P/S

AUDREY WEINER, AS ADMINISTRATRIX OF THE ESTATE OF JULIE A. WEINER, Deceased,
Plaintiff-Appellant-Appellee,

-v-

BARBARA WEINER, LOUIS B. WEINER, BARRY STONE, JANE STONE, GREYHOUND BUS LINES, INC., and RONALD BROWN,
Defendants-Appellees-Appellants.



Appeal from the United States District Court for the Eastern District of New York

APPELLANT'S REPLY BRIEF

SPATT, BAUMAN & WILKINS
Attorneys for Plaintiff-Appellant-Appellee
225 West 34th Street
New York, N.Y. 10001

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel. (212) 447-5358

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REPLY BRIEF OF PLAINTIFF-
APPELLANT AUDREY WEINER

POINT ONE: ERRONEOUS DISMISSAL OF COMPLAINT AS TO DEFENDANTS GREYHOUND AND BROWN PREJUDICED BALANCE OF CASE

The Trial Court erred in dismissing the action as to defendants GREYHOUND and BROWN. Such action by the Court amounted to the improper substitution of the Court's judgment for that of the jury.

The trial judge indicated in his post-trial decision the he believed the discrepancies in driver BROWN's testimony to be the result of "semantic confusion" and the "usual triumphs of lawyer over layman" (14) and other rationalizations.

The entire question of credibility raised by the very material discrepancies in driver BROWN's testimony and written reports as to speed, awareness of danger and reaction thereto all are vital to the heart of this party-witness' credibility, and without question the job of scrutinizing the evidence, of accepting or rejecting any or all of it, is for the jury alone. Salomone v. Yellow Taxi, 242 N.Y. 251 at p.258.

POINT TWO:
DEFENDANT'S CONCEDEDLY IMPROPER REMARKS REQUIRE A NEW TRIAL: NOT BARRED BY PLAINTIFF'S FAILURE TO MOVE FOR A MISTRIAL

The erroneous dismissal of the action against GREYHOUND and BROWN caused the later errors (already complained of in the main brief) to be of even greater significance. It made the inflammatory atmosphere created by defense counsel's improper summation more acute.

Trial counsel for defendant WEINER, highly experienced and aggressive in the representation of his principal--the insurance company--failed to remember that he did in fact represent the mother of the dead child. Even the Court felt impelled to remind counsel of his proper role in the trial (259). Counsel deliberately and with cold calculation took the evidence which was allowed expressly on the issue of credibility of Barbara Weiner as to what happened, a limited purpose, and twisted it to appeal to the passions of the jury. Even trial counsel for defendant GREYHOUND tried to limit the use of such evidence by the attorney for defendant WEINER (191, 201, 202).

Appellee's brief fails to come to grips with the very impropriety which the trial court recognized. Implicit in this silence is admission. Defendant-appellee, therefore, concedes that the comments of counsel were prejudicial, inflammatory and improper, but would like to hide behind some rule of law which he claims required plaintiff's counsel to move for a mistrial or otherwise waive all claims of error. This is not the law. None of the cases cited by plaintiff in the main brief dealt with motions for mistrials for improper remarks of counsel. Despite the lack of said motions, the Courts invariably sustained plaintiff's position, holding that the effect of the remarks was so prejudicial as to require a new trial. And contrary to counsel's statement, the law enunciated in GUTIN v. MASCALI & SONS, INC., 198 NYS 2d 492 is still valid. That case was appealed and reversed on other grounds not pertinent to this point.

POINT THREE:
POST-VERDICT MOTION SHOULD NOT BE CONTROLLING IN THE DETERMINATION OF THIS APPEAL

Nor should defendants be permitted to avail themselves of the proposition that this appeal should be denied because the trial judge, on the post-verdict motion, refused to set the verdict aside. The trial judge throughout the trial made no secret of his dislike for this case (195-197; 201; 233; 245; 260; 263; 269) and in his decision referred to the "moral repugnance" for this type of matter (6), and "tolerance of such litigation" despite the fact that it is expressly permitted under state law (8). When the trial court, bearing an attitude such as this, is called upon to review the evidence, and takes upon itself the job of passing upon the credibility of the witnesses and quality of the evidence, as with defendants GREYHOUND and BROWN, and the entire question of the negligence of the mother-driver in the post trial motion, the decision on that motion must be cautiously regarded. Can it not be said that the trial court was responding in part to the "profit-for-her-own-wrong" argument that was advanced to the jury? The mere fact

infant daughter's death was erroneous and p

that the record is permeated with documentation of this attitude by the trial judge indicates a real question as to the conduct of the trial, and for this reason alone a new trial--perhaps split on the issues of liability and damages--should be awarded.

POINT FOUR: SERIOUS ERRORS IN THE CHARGE REQUIRE THE GRANTING OF A NEW TRIAL

The so-called "Noseworthy charge" in a death action is fundamental, and is a doctrine derived from the truest principles of justice. The plaintiff--the proponent in the action--is dead and cannot come forward with any information as to the happening of the accident. "Noseworthy" must be charged, as cited in the main brief. To say that the dead child could not herself explain what happened were she alive is sheer speculation which is impermissible. The charge is, in fact, standard, as stated by the trial judge in his post-verdict decision (10) and reversible error if not given to the jury.

Finally, there is the error in refusing the charge on the Estate's right to sue. Rarely is a plaintiff faced with the force and scope of an attack as was forthcoming from all of the defendants in this case. Counsel for defendant WEINER

erupted in summation with an argument so patently appealing to the passions of the jury, completely obliterating the fact that the plaintiff in the action was the administratrix of the estate, practically calling on the jury to punish his own client for what he saw as her greed and immorality, ignoring the fact that the father of the child, also a passenger in the car, would benefit from the estate's recovery. The nature of the judicial system requires partisan expression, as no doubt recognized by the jury. To even suggest that plaintiff's counsel's summation could even begin to undo the cumulation of trial and summation statements is to ascribe too great a weight to counsel's skill and expertise, and to the weight a jury would give to such statements. Fundamental justice and fairness cried out for the voice of impartiality -- the trial judge in his charge -- to put the proper perspective into play. How can it be claimed that merely stating that the law gives the right to sue is highly prejudicial to the defendant, in view of the inflammatory statements which were permitted? This, coupled with the denial of the motion to set aside the verdict condones the very conduct which the trial judge indicated transgressed proper bounds.

CONCLUSION

It is respectfully submitted that the verdict in favor of defendant BARBARA WEINER should be set aside; the dismissal of the complaint as to defendant GREYHOUND and BROWN should be reversed, the complaint reinstated, and a new trial awarded in the interests of justice, and on the law and facts.

Respectfully submitted,

SPATT, BAUMAN & WILKINS, P.C.
Attorneys for plaintiff-
appellant AUDREY WEINER

ARTHUR D. SPATT,

Of Counsel

Weiner v. Weiner - Spatt

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 21st day of Oct, 1975 at No. See below deponent served the within Brief upon See below the appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 21 day of Oct 1975

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0182945
Qualified in Richmond County
Commission Expires March 30, 1976

John S. Zachary
75 Little Clove Rd.
S.I. NY

Schwartz, Levitt, Sommer & Blatt
50 Court St
Brooklyn, NY

Reilly & Reilly
233 Broadway
N.Y.C